

Protecting Digital Assets After Death

by Nicholas J. Kaster

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Make Time for Minutes

by Richard J. Kelber and Yuri B. Berndt

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Should I Stay or Should I Go? Considerations for Renting Out a Residence During Major Events

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Large public events, such as the Super Bowl, present a potentially lucrative opportunity to rent all or part of a home, condo, or apartment for a promising cash windfall.



Protecting Digital Assets After Death*

By Nicholas J. Kaster | 612-877-5444 | Nicholas.Kaster@lawmoss.com

One of the more challenging elements of estate administration is identifying the decedent's assets. In the past, family members or friends responsible for administering the estate were told to look through the decedent's file cabinets, watch the mail, and review old tax returns in order to find clues about the assets. Although not perfect, these strategies usually provided the needed information.

With the advancement of the Internet and e-based services and products, the tried-and-true strategies of asset location are becoming less reliable. More and more bank and credit card statements are being delivered via e-mail, bills are being paid by online services, funds are deposited in Internet-only banks, income tax returns are prepared online, and pictures are stored on phones and tablets. As a result, there are fewer documents stored in file cabinets or delivered via U.S. mail. The Internet has also created new marketplaces to purchase music, videos, and other content.

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As a result of technological advances, a person's assets, in addition to real estate, bank, and investment accounts, may also include a PayPal account, a cache of Bitcoins, websites, and a blog.

Like tangible assets, "digital assets" may have monetary value and contain personal or private information that merits protection. However, unlike tangible property that is safeguarded using physical measures (e.g., safe deposit boxes, in-home safes, locked file cabinets), digital assets are protected through the use of biometrics, passwords, and usernames. Moreover, digital assets can be safeguarded at the hardware level to require a password to access the phone, tablet, or computer; and at the asset level to require a username and password to access an account, website, or software.

Reliance on passwords is an effective protection strategy because, in most cases, they are not shared with others or written down. When administering an estate,

encountering password-protected hardware and digital assets can preclude the discovery of assets and potentially affect the amount received by beneficiaries, family members, or heirs.

Many people overlook the monetary and sentimental value of digital assets and the information needed to ensure they are discovered and administered according to their estate plan. The following are suggestions we encourage clients to think about for their digital assets:

1. Conduct a Digital Audit

Conduct a "digital audit" and create an inventory of various classes of digital assets (e.g., email accounts, social media accounts, hardware, and software). The inventory should list the username, account number (if applicable), and password for:

- Hardware (e.g., computers, mobile phones, netbooks, notebooks)
- E-mail accounts

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Marcy Frost Rejoins the Team



Marcy Frost

We are pleased to announce that **Marcy R. Frost** has rejoined the firm in an “of counsel” capacity, adding to our existing services in the area of employment law. As a Certified Labor and Employment Law Specialist, Marcy advises businesses on the full spectrum of legal issues concerning their workforces. She works with clients to develop employment policies and manuals and on the best methods to communicate policies effectively to their employees. When addressing hiring, firing, and other changes in the employment status, Marcy serves as a trusted resource for the numerous questions that arise. Marcy drafts agreements covering employment, independent contractors, confidentiality, non-competition, and separation terms that maximize clients’ rights and competitive advantage. Marcy received her J.D., *magna cum laude*, from the University of Minnesota Law School and her B.A., with distinction, from the University of Wisconsin-Madison.

Two New Attorneys Have Joined the Team

Stuart V. Campbell has joined the firm’s litigation team. Stuart assists businesses and individuals with their litigation needs, including commercial and business disputes and a variety of other areas. Prior to joining Moss & Barnett, Stuart worked as a litigator in the public and private sector and has first-chair civil and criminal trial experience. He received his J.D., *magna cum laude*, from the University of Minnesota Law School and his B.A. from the University of Minnesota College of Liberal Arts.

Nicole A. Swisher has joined the firm’s business law team. Nicole advises clients on a broad range of corporate and financial transactions, including corporate formation and governance, mergers and acquisitions, and corporate restructurings. During law school she

served as the Publications Editor for the *University of St. Thomas Law Journal*, as well as a law clerk for the Ramsey County Attorney’s Office in St. Paul, Minnesota. Before joining Moss & Barnett, Nicole clerked for two years for the Honorable J. Leon Holmes in the U.S. District Court for the Eastern District of Arkansas. She received her J.D., *magna cum laude*, from the University of St. Thomas School of Law and her B.A., *magna cum laude*, from the University of Minnesota-Twin Cities.



Stuart Campbell



Nicole Swisher

Moss & Barnett’s New Certified Paralegal



Martha Berreman

Martha I. Berreman, a paralegal with our intellectual property team, was recently certified as a Minnesota Certified Paralegal (MnCP). Martha supports and assists the firm’s attorneys in preparing and filing copyright applications, as well as domestic and foreign trademark applications. She also assists in maintaining trademark registrations. In June 2014, the Minnesota Paralegal Association announced its voluntary certification program to establish a standard of competency for paralegals in Minnesota. The program is an opportunity for Minnesota paralegals to validate their qualifications and offers a credential to paralegals who meet certain education and experience requirements. Martha joins the ranks of our other MnCPs: **Loralee Berle**, **Shelly Doerr**, **Stacie Iverson**, **Mara Gollin-Garrett**, **Carolyn McCune**, and **Carol Yerks**. Paralegals are key elements of the firm’s practice teams, assisting the firm’s attorneys in providing efficient, cost-effective solutions to our clients.

Moss & Barnett is Pleased to Recognize the Following Team Members:

Michael T. Etmund and **Michael S. Poncin**, attorneys with our creditors’ remedies and bankruptcy team, have been honored to serve as chairs of state chapters of the Association of Credit and Collection Professionals (ACA International). **Mike Etmund** will serve as the ACA New York Attorney State Chair, and **Mike Poncin** will serve as the ACA Minnesota Attorney State Chair. Both terms will run October 1, 2016 to September 30, 2017. The State Chairs are attorneys who have volunteered to be available as a legal resource and referral attorney for ACA International.



Mike Etmund

and other statutes. He regularly represents creditors, including corporations and other general business entities, in contract, compliance, and commercial collection matters.

Mike Poncin has a nationwide civil litigation practice defending creditors, debt buyers, debt collectors, and attorneys in actions arising under the FDCPA, FCRA, Telephone Consumer Protection Act (TCPA), and additional federal and state laws and regulations. He provides advice and counsel on litigation and compliance issues across the United States.



Mike Poncin

Mike Etmund practices in the areas of debt collection, breach of contract, and in the defense of claims brought under the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA),

Congratulations to our Moss & Barnett colleagues on these well-deserved honors recognizing their contributions to the debt collection industry.

ALERT: Annual Business Renewals and the Minnesota Business Snapshot

This is a reminder that annual renewals for *all* Minnesota limited liability companies, limited liability partnerships, limited partnerships, for-profit and non-profit corporations, cooperatives, assumed name certificates, and foreign business registrations must be filed with the Minnesota Secretary of State no later than **December 31, 2016**. Failure to timely renew can lead to confusion or delay in certain business transactions, additional costs, administrative dissolution or termination, and even the loss of entity name.

Businesses filing their annual renewals online this year will, for the first time, be presented with a brief "Business Survey" requesting certain employee, ownership, operational, and financial data. **Please note that this survey is not part of the mandatory renewal process, and participation is purely voluntary.** In deciding whether to provide information requested by the survey, businesses should be aware that all responses are public under state law and that the Secretary of State's Office plans to package and sell the data beginning in early 2017.

ALERT: New Rules Expand Overtime Pay Eligibility

The U.S. Department of Labor recently issued new rules raising the salary threshold required to qualify for the "white collar" exemption under the Fair Labor Standards Act to \$47,476 per year or \$913 per week. The new salary level is more than double the current \$23,660 annual or \$455 weekly cutoff to qualify for exemptions for executive, administrative, and professional employees.

Employers are now faced with the challenge, before **December 1, 2016**, of analyzing the status of all employees who earn less than the new salary threshold, but who were previously exempt from overtime, to determine how they will be paid going forward. Employers will have to consider whether to increase the salaries of those employees to meet the new salary threshold or to reclassify them as non-exempt and thus eligible for overtime.

ALERT: Proposed Changes to IRS Regulations May Limit or Eliminate Valuation Discounts for Family-Owned Businesses

Currently, individuals can transfer ownership interests in family-owned businesses to other family members at a reduced tax cost by relying on valuation discounts. The value of interests transferred to family members is usually discounted because of various restrictions imposed on the new owner's ability to participate in management, transfer his or her ownership interests, or compel the sale of the business. The proposed rule change, if adopted, may effectively eliminate discounts for restrictions on the new owner's ability to:

- Participate in management (lack of control)
- Transfer ownership interests (lack of marketability)
- Force a distribution or sale

In addition, if the new rules are adopted, the rules will also expand the circumstances where changes to voting and liquidation rights associated with ownership interests in the family-owned businesses will be subject to gift or estate tax.

The public hearing on the proposed regulations is scheduled for **December 1, 2016**, and the new regulations (if adopted) are expected to become effective in 2017. However, because of the uncertainty about if and when the proposed rule change will be adopted, we encourage owners of family businesses to evaluate options for transferring ownership interests to family members sooner rather than later to ensure valuation discounts can be used before any new regulations are adopted.

If you would like assistance in assuring best practices in any of these areas, please contact your attorney at Moss & Barnett.

Make Time for Minutes

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Rick Kelber is a member of our business law and wealth preservation and estate planning teams. He represents clients in buying and selling businesses, financial transactions, and estate and succession planning. Having also worked in a corporate setting, he also brings a financial and business approach to his practice.

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Yuri Berndt is a member of our business law and wealth preservation and estate planning teams. He represents individuals and business clients in the areas of business organization, structuring, and transactions. He also advises clients on tax planning issues.

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An important benefit of incorporating a business or organizing it as a limited liability company ("LLC") is to obtain liability protection. Historically, in exchange for the liability protection provided to owners of a corporation or LLC, certain "corporate formalities" had to be followed. As such, business owners were strongly encouraged to hold annual meetings or adopt written actions in lieu of a meeting to reduce the risk that creditors or claimants could "pierce the corporate veil" based on the absence of these records. Even though liability protection was often the driving factor in the creation and preservation of meeting minutes and written actions, these documents also constituted a permanent, tangible record of the major decisions made by the owners and/or directors of the business and satisfied various tax requirements.

Changes in the law have reduced reliance on corporate formalities to preserve liability protection, and, as a result, many businesses

hold owner and board meetings and adopt written actions less frequently. Nevertheless, documents such as minutes and records of action remain important and useful for reasons other than liability protection, and their creation is necessary or strongly advisable in many circumstances.

The following matters, for instance, must be memorialized in corporate records:

Bonuses to Executives

For accrual-basis taxpayers that authorize the payment of a bonus but delay actual payment for the bonus until the following year, the bonus must be earned, determined, and authorized by its board in order for the bonus expense to be deductible in the current year. Accordingly, the minutes of a board meeting or written action in lieu of a board meeting can be used to substantiate the deduction.

Adoption of and Contributions to Qualified Retirement Plans

Generally, the adoption of retirement plans or amendments to existing plans should be accomplished before year-end. In addition, if a contribution is to be made to a qualified retirement plan after the end of the current year, a board resolution establishing the amount of the contribution (or how the contribution will be determined) must be adopted before the end of the current year for the contribution to be accrued and deducted in the current year.

Charitable Contributions

Accrual-basis C-corporations are entitled to a charitable contribution deduction in the year the contribution is made or in which it is properly accrued. If the contribution is not made before year-end, a board resolution must authorize the contribution to substantiate the deduction.

Distributions

Under Minnesota law, the board of directors can make a distribution only if the business will be able to pay its debts in the ordinary course of business after making the

distribution. Meeting minutes or a written action should be used to memorialize any distributions. Written records of the board's deliberation and decision can detail the factors the board considered when making the determination to make a distribution, and may be used to support the decision if later challenged.

There are other situations where minutes or records of action are desirable, although not legally required, in order to memorialize or ratify actions taken during a year. Some of these situations include:

Election, Re-election, and Appointment of Board Members and Officers

Minutes documenting the election, appointment, or reappointment of board members and officers can be used to establish the term for which the directors or officers will serve.

Compensation

Minutes should be adopted at the end of each year to specify the amount of compensation to be paid in the following year to business owners who are employed by their company.

Ratification of Related Party Transactions Such as Related Party Loans, Leases, Etc.

Meeting minutes and written records of action can provide supporting evidence if tax deductions are contested. For example, when a company loans funds to an owner, there is a risk that the loan may be turned into a distribution. Although the nature of the transaction should be characterized in the transaction documents (e.g., loan agreement, promissory note, security agreement), it is helpful if meeting minutes or a written action recite the proposed use for the loaned funds and a summary of the loan or lease terms.

Establish Business Valuations

Many buy-sell agreements require owners or directors to establish the value of their company annually. Including the annual value of the company made pursuant to the

Should I Stay or Should I Go? Considerations for Renting Out a Residence During Major Events*

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Joshua Bobich is a member of our business law; mergers, acquisitions, and corporate finance; and technology teams. Josh is focused on achieving business-efficient legal solutions

for privately held and family-owned entities in a variety of transactional matters, with particular experience in the industries of technology, manufacturing, real estate, retail, and hospitality.

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The Twin Cities will be the center of the sporting universe in the next few years, including the Super Bowl (2018), X Games (2017 and 2018), the NCAA Men's Basketball Final Four (2019), and the Red Bull Crashed Ice.

What Does this Mean to You?

These events present a unique, potentially lucrative, opportunity for Twin Cities residents to rent all or part of their home, condo, or apartment, for a cash windfall. Early listings show one-bedroom condos in Minneapolis going for as much as \$4,000 per night during the Super Bowl. Who needs to watch the shivering masses when you can see the Big Game from a tropical latitude, your trip financed by your two-week rental?

As with all too-good-to-be-true scenarios, this one has some unattractive realities.

The Tax Man Cometh — Eventually

Private owners can rent their residences for up to 14 days in any calendar year, and any payments received during that period are not included in the owner's taxable income for the year, no matter how much is earned. However, the owner must also use the property for their own personal use at least 14 days of that same year. One of the trade-offs of using this exception is that the owner cannot deduct expenses or take depreciation deductions related to the rental.

Rent payments generated from rentals of private residences for 15 or more days in a calendar year must be reported as taxable income by the owner. However, unlike for rentals of 14 or fewer days, the owner is able to take deductions and applicable depreciation, but only up to the amount of taxable income generated from the rental of the property.

In addition to potential income taxes, all short-term rentals of fewer than 30 days in Minnesota are subject to state sales tax (6.875 percent). If the property is located in Minneapolis, there are additional taxes that will add another 3.9 percent. That means 10.775 percent less of a vacation from your rental income windfall.

Rules, Rules, and More Rules

There are a host of local laws and ordinances that will almost certainly apply to even the most simplistic short-term rental. Metro municipalities may have rules and requirements in place with regard to the renting of property, including zoning restrictions, building and housing standards, and the need to apply for and obtain various licenses. Using Minneapolis as an example, at a minimum, a short-term rental of a residential space requires the owner to obtain a "bed and breakfast facility" license, which involves compliance with various zoning, health, housing, and other codes. While not every person listing a room through an on-line service has obtained the necessary licenses for the short-term rental of their property, the failure to do so could subject the owner to substantial fines or other legal action.

Even more impactful than local law might be restrictions that are in place if the property is part of a condo or townhome development. It has become increasingly common for these groups to include significant restrictions or prohibitions on the rental of property in their rules, bylaws, or association agreements. If an owner violates these restrictions,

the association could take legal action to stop the rental activity or impose a fine or penalty. For example, one loft complex in the North Loop neighborhood of Minneapolis has already (and publicly) warned its owners that they will be subject to a fine of up to \$5,000 if they choose to rent out their property during the Super Bowl.

About That Broken Stair...

Renting out a residence raises the possibility that a guest could be injured during the stay. If the owner's negligence was found to be the cause, all of that rental income could very quickly end up in the hands of a defense attorney. No matter the outcome, litigation is expensive and could cost the owner much more than just the rent.

Short-term renter's insurance can be obtained through any number of insurance brokers and carriers, but appropriate coverage might also be available as a rider or endorsement on the owner's existing homeowner's policy. Before relying on an existing policy, however, the policy document should be reviewed in detail and, if possible, confirmation in writing of the available coverage should be obtained from the insurer.

Short-term and vacation rental listing services such as Airbnb and VRBO may also have protection available to those who list on their website. Airbnb is the industry leader in this category through its Host Protection Insurance Program, which provides up to \$1 million of liability coverage per occurrence, and a cap of \$1 million for each listing location (subject to certain limitations, of course).

Proceed with Caution

There will undoubtedly be multiple opportunities for homeowners to cash in when the bright lights are shining on the Twin Cities. But, before advertising your home and hightailing it to the Caribbean, be sure to consider whether it might make more sense to stick around and experience the spectacle firsthand.

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Protecting Digital Assets After Death - Continued from Page 1

- Social media accounts
- Blogs, domain names, and websites
- Photo accounts
- Financial accounts

2. Consider Options For Storing Username and Password Information

The most challenging aspect of creating a plan for digital assets is overcoming the justifiable fear of consolidating passwords, account numbers, and usernames in one document. Some prefer a handwritten list stored in a safe deposit box or some other secure location – while others favor an electronic list stored on an encrypted USB drive.

Considering the frequency with which passwords are changed, updating the digital inventory presents an additional challenge. Establishing two or more dates per year (e.g., children’s birthdays or daylight saving time) has proven to be an excellent reminder to review and update the inventory. Alternatively, a password managing service can be used.

3. Review and Update Estate Planning Documents.

Review your wills, revocable trusts, and powers of attorney to ensure that these documents authorize an individual to access and manage digital assets. Minnesota recently adopted the Uniform Fiduciary Access to Digital Assets Act (UFADA), which allows personal representatives, trustees, attorneys-in-fact, and other authorized agents to manage digital assets. Because UFADA will allow a fiduciary access to e-mail, text messages, and social media accounts only if the fiduciary is specifically authorized to do so in writing, it is increasingly important to ensure that provisions addressing digital assets are included in estate planning documents.

4. Make a Plan for Managing Digital Assets After Death.

Review the digital inventory and develop a written plan outlining how digital assets should be handled after death. In some cases, accounts may contain sensitive or secret information that is to be deleted and not revealed to certain persons.

5. Start Thinking About Your Digital Footprint.

As digital assets become more prevalent in day-to-day life, they will also take on greater significance after death. Absent special efforts to help surviving family members and friends discover and access digital assets, individuals may be unintentionally sacrificing assets with significant emotional and monetary value. However, with a little forethought and planning, individuals can simplify estate administration and preserve these assets for their heirs.



Nicholas Kaster is a member of our business law and wealth preservation and estate planning teams. He works with families and business owners on matters related to wealth transfer, wealth preservation, business succession, and philanthropy.

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Make Time for Minutes - Continued from Page 4

agreement in meeting minutes or a record of action can help avoid conflict or uncertainty upon the death of an owner or other buy-sell event. Moreover, a periodic review of the company’s value can better ensure that the company has sufficient life insurance or other resources to purchase the ownership interest of an owner should it become obligated to do so.

Significant Asset Sales or Purchases

Under Minnesota law, various transactions require board approval and, in some cases,

approval by the owners. Those approvals are typically documented when the transaction occurs, but any approvals not obtained at that time can be addressed at year end by a ratifying action taken during the year.

Be aware, however, that because the legal and practical considerations that apply to publicly traded companies materially differ from those applicable to privately held companies, records requirements for publicly held companies are beyond the scope of this article.

Cognizant that time and money are limited, we encourage business owners to call or meet with their attorney to conduct an annual business “checkup.” In our experience, a relatively small investment of time and expense can result in significant benefits when minutes or other documents are available to prevent ambiguities or misunderstandings, substantiate accruals for tax deductions, and serve various other purposes. Accordingly, we encourage all business owners to make time for minutes.

GREAT TEAMS ACHIEVE GREAT RESULTS

Moss & Barnett Congratulates its Attorneys Included in 2017 *Best Lawyers*

Moss & Barnett is pleased to congratulate its attorneys who were included in *The Best Lawyers in America*® for 2017.

- **Cindy J. Ackerman** – Trusts and Estates
- **Yuri B. Berndt** – Tax Law and Tax Litigation & Controversy
- **Kevin M. Busch** – Banking and Finance Law, Financial Services Regulation Law, Banking & Financing Litigation, and Securitization and Structured Finance Law
- **Jana Aune Deach** – Family Law
- **Richard J. Johnson** – Administrative/Regulatory Law and Energy Law
- **Richard J. Kelber** – Corporate Law and Mergers & Acquisitions Law
- **Susan C. Rhode** – Family Law and Family Law Mediation
- **Thomas J. Shroyer** – Commercial, Intellectual Property and Securities Litigation, and Professional Malpractice Law-Defendants
- **James J. Vedder** – Family Law
- **Jeffrey L. Watson** – Real Estate Law

Each year, *Best Lawyers* bases its selection entirely upon peer-review, which is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical and legal practice areas. *Best Lawyers* then compiles lists of outstanding attorneys and publishes an annual referral guide: *The Best Lawyers in America*®.



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Yuri B. Berndt



Kevin M. Busch



Jana Aune Deach



Richard J. Johnson



Richard J. Kelber



Susan C. Rhode



Thomas J. Shroyer



James J. Vedder



Jeffrey L. Watson

Moss & Barnett Named a "Best Law Firm" for 2017

We are very pleased to report that Moss & Barnett has once again been named a "Best Law Firm" by *U.S. News – Best Lawyers*.



client and lawyer evaluations, peer review from leading attorneys in their field, and a review of additional information provided by law

The 2017 "Best Law Firms" list reflects the high level of respect that a firm has earned among other leading lawyers and clients in the same communities and in the same practice areas for their expertise, professionalism and integrity. The rankings are based on a rigorous evaluation process that includes the collection of

firms as part of the formal submission process. Clients were asked to provide feedback on firm practice groups concerning expertise, responsiveness, understanding of the business and its needs, cost effectiveness, civility, and whether they would refer another client to the firm. Attorneys also voted on expertise, responsiveness, integrity, cost effectiveness, whether they would refer a matter to the firm, and whether they consider the firm a worthy competitor.

We would like to thank our many clients and the attorneys from other law firms who took the time to participate in this survey on our behalf. All of the attorneys, paralegals, and administrative and support staff at Moss & Barnett are committed to providing you with effective, high quality, timely, and efficient solutions to your legal needs. It is our honor to offer you the quality service that you have every right to expect from your law firm.

To learn more about Moss & Barnett, our attorneys, and our various practice areas, please visit our website at LawMoss.com.

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

Did You Know?

Wayne A. Hergott, a retired Moss & Barnett attorney, was awarded the Father Walter Reger Distinguished Alumnus Award at the Saint John's University homecoming banquet on September 16, 2016. The award is the highest honor bestowed by the Alumni Association and salutes a key alumnus in the name of Fr. Walter Reger, OSB (1894-1971), who was the long-time secretary of the Alumni Association. After the death of a SJU football teammate in 2009, Wayne invited a few fellow alumni for lunch in the Twin Cities and became the official

convener of the "Lunch Bunch," a growing group of "Johnnies" that meets monthly for socializing, lunch, and a speaker.

When Wayne started at SJU in 1953, he was Coach John Gagliardi's first quarterback. He played four years of baseball and was a member of three championship teams. Wayne served in the military before pursuing law school at William Mitchell College of Law and embarking on a 31-year career as a civil trial attorney at Moss & Barnett. After retiring from law, Wayne earned his master's degree

in spirituality from St. Catherine University and then enjoyed an additional career as a spiritual director and retreat leader.

We offer our heartfelt congratulations to Wayne on this well-deserved recognition!



Wayne Hergott and the "Lunch Bunch"

Photos courtesy of Saint John's University



Wayne Hergott and Dr. Michael Hemesath,
President of Saint John's University